



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2004

Ms. Sara Shiplet Waitt
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2004-6397

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205278.

The Texas Department of Insurance ("TDI") received a request for information regarding the investigation of Brown & Brown Insurance Services of Texas, Inc. ("Brown & Brown"). You indicate that some of the requested information is being released. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5. In addition, pursuant to section 552.305 of the Government Code you notified Brown & Brown, whose proprietary interests may be implicated by the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). Brown & Brown claims that its client list is excepted from release under sections 552.101 and 552.110 of the Government Code. We have considered all arguments and reviewed the submitted information.

You inform us that some of the requested information, which you have not submitted to this office for review, is the subject of the lawsuit filed with respect to Brown & Brown's claims in Open Records Letter No. 2003-5694 (2003).¹ Because this information is the subject of

¹*Brown & Brown Ins. Serv. of Tex. v. Abbott*, No. GN303233 (353rd Dist. Ct., Travis County, Tex. Aug. 26, 2003).

pending litigation, we will let the court decide the disposition of this information. You have also submitted new information that was not at issue in Open Records Letter No. 2003-5694. Brown & Brown is making the same arguments against disclosure for this new information that it made for the information at issue in Open Records Letter No. 2003-5694. Accordingly, we decline to rule on Brown & Brown's arguments at this time and will defer to the court's decision in the pending case regarding this matter.

You also indicate that Open Records Letter No. 2001-4777 (2001) is applicable to some of the submitted information. In that decision, we authorized TDI to withhold, under section 552.101 of the Government Code in conjunction with common-law privacy, information that identifies an enrollee in a health plan, without the necessity of again requesting a decision under section 552.301 of the Government Code, as long as the elements of law, fact, and circumstances on which the prior ruling is based do not change. TDI informs us that it has marked information in the submitted documents that identifies enrollees in a health plan and is therefore excepted from disclosure under Open Records Letter No. 2001-4777. We have marked some additional identifying information in the submitted documents that is excepted from disclosure under Open Records Letter No. 2001-4777. TDI does not inform us of any change in the law, facts, or circumstances on which the prior ruling is based. Accordingly, TDI must withhold the marked portions of the submitted information that identify an enrollee in a health plan in accordance with Open Records Letter No. 2001-4777. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001).

Next, you explain that this office considered the disclosure of several of the submitted documents in Open Records Letter No. 2003-5694 (2003). In that decision, we concluded, in part, that TDI must withhold certain account numbers under section 552.136 of the Government Code and certain e-mail addresses under section 552.137 of the Government Code. We understand that the four criteria for the first type of previous determination established by this office in Open Records Decision No. 673 (2001) have been met.² Therefore, we agree that TDI must withhold the account numbers and e-mail addresses it has marked in accordance with Open Records Letter No. 2003-5694.

We now turn to the submitted information that is not subject to previous rulings of this office. We note that the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

²The four criteria for this type of previous determination are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You inform us that the submitted information comprises a completed investigation made of, for, or by TDI that is subject to section 552.022 of the Government Code. Therefore, the information must be released under section 552.022(a)(1) unless it is expressly made confidential under other law. We note that some of the submitted information is confidential by law under sections 552.136, and 552.137 of the Government Code. We will therefore address those exceptions for the submitted information. We also note that you claim the attorney-client and work product privileges under section 552.101 of the Government Code and under the Texas Rules of Evidence and the Texas Rules of Civil Procedure.³ The Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for the purposes of section 552.022 of the Government Code. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Therefore, we will also consider whether the TDI may withhold the submitted information under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

For the purpose of section 552.022, information is confidential under Texas Rule of Civil Procedure 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial

³As we recently reaffirmed in Open Records Decision No. 676 (2002), section 552.101 does not encompass the Texas Rules of Evidence and Civil Procedure. See Open Records Decision No. 676 at 2 ("we find no authority to support a conclusion that the Texas Rules of Civil Procedure or the Texas Rules of Evidence are constitutional law, statutory law, or judicial decisions so as to fall within section 552.101's purview").

chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You indicate that the submitted information is from an investigative file that was created in anticipation of litigation. You indicate that the investigation was conducted for the purpose of preparing for litigation. You contend that the submitted information reveals the thought processes, conclusions, and legal theories of a TDI attorney. Based on your representations and our review of the submitted information, we conclude that some of the submitted information may be withheld as core work product under Texas Rule of Civil Procedure 192.5. We have marked this information accordingly. You have not demonstrated how the remaining information reveals the mental processes of an attorney or attorney's representative. Therefore, TDI may not withhold the remaining information under rule 192.5.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information). You inform us that the March 9, 2004, memorandum you have marked is a communication between attorneys for TDI and TDI executive staff for the purpose of rendering professional legal services. You have identified all parties to the memorandum as privileged parties. You indicate that TDI has maintained the confidentiality of this communication. Based on your representations, we conclude the memorandum is protected under Texas Rule of Evidence 503. We have marked this information accordingly.

We note the presence of additional account numbers which TDI has not marked pursuant to the previous determination in Open Records Letter No. 2003-5694. Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the additional account number information in the submitted documents that TDI must withhold under section 552.136.

The submitted information also contains e-mail addresses which TDI has not marked pursuant to the previous determination in Open Records Letter No. 2003-5694. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, TDI must withhold the marked e-mail addresses of members of the public under section 552.137.

In summary, we decline to rule on Brown & Brown's arguments against disclosure. TDI must withhold the information subject to previous determinations in Open Records Letter Nos. 2001-4777 and 2003-5694. TDI may withhold the marked information pursuant to Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. TDI must also withhold the information we have marked under sections 552.136 and 552.137. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 205278

Enc. Submitted documents

c: Mr. Lance Kirby
2300 West Pike Boulevard, Suite 300
Weslaco, Texas 78596
(w/o enclosures)

Mr. Keith G. Hopkinson
Cantey & Hanger, L.L.P.
400 West 16th Street, Suite 200
Austin, Texas 78701-1647
(w/o enclosures)